88-573

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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER _____

HOWARD PHILLIPS,
Petitioner

VERSUS

TOTCO, A DIVISION OF BAKER
INTERNATIONAL CORPORATION, et al
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ARTHUR COBB
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Attorney for Howard Phillips

QUESTIONS PRESENTED

WAS PLAINTIFF DENIED EQUAL PROTECTION OF LAW BY THE UNITED STATES DISTRICT COURT (SITTING IN DIVERSITY) BECAUSE THE COURT FAILED TO APPLY LOUISIANA SUBSTANTIVE LAW?

WAS THE FIFTH CIRCUIT CLEARLY ERRONEOUS IN HOLDING THERE WAS NO "PLAIN ERROR", SO AS TO REVERSE THE JURY VERDICT BECAUSE OF AN INCORRECT JURY INTERROGATORY?

LIST OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

Howard Phillips, Plaintiff

Arthur Cobb, Attorney for Plaintiff

Totco, A Division of Baker International Corporation, Inc., Defendant

Employees National Insurance Company Defendant

Edward O. Taulbee, IV
Attorney for Totco
Post Office Box 3808
Lafayette, LA 70508

By Attorney for Plaintiff

ARTHUR COBB, Trial Attorney
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LOWER COURT ACTION

The jury found defendant "not strictly liable to plaintiff".

JURISDICTIONAL GROUNDS IN THIS COURT

The Judgment of the Fifth Circuit is dated 10 August 1988. The time of entry is 10 August 1988. The Statutory Provisions granting jurisdiction in this Court are:

28 USC 2101(c); the Seventh Amendment; and Supreme Court Rule 17(1)(a).

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

28 USC 1332(a)(1).

STATEMENT OF THE CASE

Howard Phillips was sent to conduct a standard pressure test on a blow-out preventer for his employer, Southland Rentals. He was to record the test with a **high** pressure Totco recorder. The Totco recorder was connected to the **high** pressure equipment by means of certain tubes and couplers. The couplers that connected the recorder to the **high** pressure equipment were to withstand pressures of up to 15,000 psi, as was the recorder. High and low pressure couplers are identical in design and can be easily interchanged on the Totco recorder.

On 6 November 1982, a **low** pressure coupler (manufactured to withstand a maximum pressure of only 6,500 psi) was connected to the Totco recorder without the knowledge of Mr. Phillips. As Mr. Phillips conducted the test, the Totco recorder exploded in his face, causing serious injury. The explosion was a result of the low pressure coupler (6,500 psi) being on the **high** pressure Totco recorder.

Mr. Phillips sued Totco in the United States Court for the Middle District of Louisiana under 28 USC 1332(a)(1) diversity jurisdiction. The trial judge allowed Mr. Phillips' fault to become an issue at trial, contrary to Louisiana law as expressly outlined in **Bell v. Jet-Wheel Blast, Inc.**, 462 So.2d 166 (La. 1985). The trial judge propounded a jury interrogatory that failed to reflect Louisiana product liability law expressly outlined in **Halphen v. Johns-Manfield, Inc.**, 484 So.2d 110 (La. 1986).

SUMMARY OF ARGUMENT

Plaintiff sued defendant under Louisiana products iability law in federal court under federal diversity jurisdiction. The jury held that defendant was not "strictly liable". This jury interrogtory in no way reflected Louisiana product liability law as set forth in **Halphen v. Johns-Manfield**, 484 So.2d 110

(La. 1986). The Fifth Circuit Court of Appeals affirmed the verdict.

The Fifth Circuit violated plaintiff's constitutional right to the "equal protection of the laws" by allowing the U.S. District Court to reach an outcome that would have been clearly the opposite in a Louisiana state court. Furthermore, the Fifth Circuit was clearly erroneous in finding that there was "plain error" which resulted in an incorrect verdict which created a substantial injustice.

ARGUMENT

Erie Railroad v. Tompkins, 58 S.Ct. 817, holds in pertinent part:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie was further extended in **Guaranty v. York,** 65 S.Ct. 1464:

> Erie R. Co. v. Tompkins * * * expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, **the outcome of the litigation in the federal court should be substantially the same,** so far as legal rules determine the outcome of a litigation, **as it would be if tried in a State court.** The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result. At. p.1470.

Clearly, this outcome determination test was violated when the trial court propounded its interrogatory to the jury.

The interrogatory in question ask the extremely limited inquiry: "Was Totco strictly liable to the plaintiff?"

Louisiana products liability law was outlined and explained by the Louisiana Supreme Court in a certified opinion to the United States Fifth Circuit. **Halphen v. Johns-Manfield,** 755 F.2d 963 (5th Cir. 1985); 484 So.2d 110 (La. 1986). The court

listed several theories of recovery under products liability, none of which can be answered or decided with the single question "was defendant strictly liable?" This interrogatory effectively denied plaintiff a fair trial on the merits.

Plaintiff was prejudiced by the federal court's limited interrogatory and was denied equal protection of Louisiana law.

Louisiana products liability law has four categories: (1) unreasonably dangerous per se, (2) failure to warn, (3) there existed alternative designs; and (4) unreasonably dangerous because of a defect in design. Plaintiff presented evidence under each and every one of these theories. However, the jury was prohibited from determining where defendant was liable. The jury interrogatory did **not** ask whether the Totco recorder's utility outweighed its risk; whether there was a defect in its design when it left the manufacturer's control; whether there were safer alternative designs; or whether defendant failed to warn of a defect or relevant danger in the use of its product.

In a Louisiana court, the jury interrogatory must reflect the "law applicable to the cause submitted to them (the jury)". Louisiana Code of Civil Procedure Article 1792(B) (West 1988). Clearly, the outcome of this case would have been different in a Louisiana courts. Louisiana courts ask the questions as set forth in **Halphen v. Johns-Manfield,** 484 So.2d 110 when determining product liability.

PLAIN ERROR RULE

The Fifth Circuit refused to consider the above argument on the ground that Federal Rule 51 prevents any party from assigning error unless an objection is entered at the trial level. Plaintiff argues that the "plain error" rule clearly applies.

The Plain Error exception has been upheld and applied on numerous occasions. **McEdward v. Northern,** 595 So.2d 105 (2d Cir. 1979); **Weidersum Associates v. National Homes,** 540 F.2d 62 (2d Cir. 1976); **Miller v. Premier,** 608 F.2d 973 (4th Cir. 1979); **Rodrigue v. Dixilyn,** 620 F.2d 537 (5th Cir. 1980); **Brown v. AVEMCO,** 603 F.2d 1367 (9th Cir. 1979); **Batesole v. Stratford,** 505 F.2d 804 (6th Cir. 1974); **Hunt v. Liberty Libby,** 720 F.2d 631 (11th Cir. 1983); Wright & Miller, Federal Practice & Procedure, Civil §2558, p.672.

"Plain error is found if the deficient charge is likely responsible for an **incorrect verdict** which in itself crates a substantial injustice." **Colomb v. Texaco, Inc.**, 736 F.2d 218, at 222. "The plaintiff must establish that the instruction was an incorrect statement of law and that it was probably responsible for an incorrect verdict, leading to a substantial injustice." at p.222.

"Was Totco strictly liable to the plaintiff?" is an incorrect statement of Louisiana law as set forth in **Halphen v. Johns-Manfield**, 484 So.2d 110. Mr. Phillips was denied a fair trial and equal protection of the law because of this erroneous discrepancy between Louisiana law and the jury interrogatory. There is really no doubt that this error was responsible for an incorrect verdict which led to a substantial injustice.

CONCLUSION

Howard Phillips was greatly prejudiced by the interrogatory the trial court presented to the jury. He was denied a fair trial, a fair determination of his case based on the present Louisiana law, and he was denied equal protection under the law. The trial court was bound to apply Louisiana law as set forth in **Halphen**. Because the trial court failed to do this,

there is a patently obvious error of law which mandates a reversal of the Fifth Circuit and a new trial for Mr. Phillips.

Plaintiff prays that this Court grant certiorari and remand this case for a new trial on the merits without error.

Respectfully Submitted:

By Attorney for Plaintiff

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CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared ARTHUR COBB, who, after first being duly sworn by me, did depose and say that the allegations of the Petition for Writ of Review and/or Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same has been mailed to Edward O. Taulbee on 9 September 1988.

_____

ARTHUR COBB

SWORN TO AND SUBSCRIBED before me on 9 September 1988.

_____

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

HOWARD W. PHILLIPS	*	CIVIL ACTION
	*	
VERSUS	*	
	*	
TOTCO, A DIVISION OF BAKER INTERNATIONAL CORPORATION, et al	*	NUMBER 85-704-B

JUDGMENT

For written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendant(s) and against the plaintiff(s) dismissing this suit with prejudice at plaintiff's cost.

Baton Rouge, Louisiana, June 22, 1987.

s/ Frank J. Polozola

U. S. DISTRICT JUDGE

(10:45 P.M. - JURY PRESENT)

THE COURT: HAS THE JURY REACHED A VERDICT?

THE FOREMAN: YES, SIR, WE HAVE.

THE COURT: OKAY, IF YOU WILL HAND IT TO THE MARSHAL, HE WILL BRING IT TO ME.

(VERDICT FORM HANDED TO THE COURT.)

THE COURT: THE CLERK WILL READ THE VERDICT.

CIVIL ACTION NUMBER 85-704-B, HOWARD PHILLIPS VERSUS TOTCO, A DIVISION OF BAKER INTERNATIONAL CORPORATION, ET AL, INTERROGATORIES TO THE JURY:

WAS TOTCO STRICTLY LIABLE TO THE PLAINTIFF? NO.

GERALD A. MYHAND, FOREMAN, 6/18/87.

THE COURT: IS THAT THE JURY'S VERDICT?

THE FOREMAN: YES, SIR.

THE COURT: DOES ANYONE WISH TO HAVE THE JURY POLLED?

ALL RIGHT.

MY CLERK IS GOING TO CALLL YOU AND ASK YOU IF THIS IS YOUR VERDICT, AND YOU WILL ANSWER YES OR NO.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-3486

HOWARD PHILLIPS, Plaintiff-Appellant

versus

TOTCO, A Division of Baker International Corporation, et al

Defendants-Appellees

Appeal from the United States District Court for the Middle District of Louisiana (CA-85-704-B)

(August 10, 1988)

Before KING, JOHNSON, and JOLLY, Circuit Judges.

PER CURIAM:*

The judgment on jury verdict for the defendant, TOTCO, dismissing plaintiff's product liability action against it, is affirmed.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes

needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On November 6, 1982, Howard Phillips sustained injuries while conducting high pressure tests on oil field equipment. Phillips alleged that his injuries occurred when a high pressure recorder, manufactured by TOTCO, malfunctioned. Phillps sued TOTCO in federal district court under a strict liability theory. The jury found for the defendants.

II.

On appeal, Phillips contends that the trial judge wrongly decided various evidentiary questions and submitted an incorrect interrogatory to thejury. He further challenges the failure of the jury to find TOTCO strictly liable.

A.

First, Phillips contends that the jury was not allowed to determine TOTCO's liability because of an incorrectly stated jury interrogatory. The interrogatory submitted to the jury stated: "Was TOTCO strictly liable to the plaintiff?" Phillips

asserts that the interrogatory does not accurately reflect Louisiana strict liability law.

We do not reach this question because the record indicates that Phillps has waived this issue on appeal. Fed. R. Civ. P. 49 allows a district court to submit special interrogatories to the jury in order that the jury may determine the potential liability of the defendant. The record reflects that all parties agreed to submit the jury interrogatory and that at no time did Phillips object to the jury instruction. As this court has stated in J.C. Motoro Lines v. Trailways Bus System, 689 F.2d 599, 602-03 (5th Cirl 1982), "[A] party who makes no objection to the omission of a special verdict question cannot object for the first time on appeal. . . By failing to object, the defendant denied the court below an opportunity to more precisely frame the issues involved. For that reason we have consistently held that a party who fails to object to the form of special interrogatories cannot complain for the first time on appeal."

B.

Phillips next contends that the jury erred in finding that TOTCO was not strictly liable for his alleged injuries. He maintains that the product was unreasonably dangerous as a matter of law.

The findings of the jury are evaluated by this court under a limited standard of review. This court will reverse a jury finding only where the evidence, viewed in its entirety and in the light most favorable to the jury's conclusion, indicates that reasonable men could not arrive at the same verdict as the jury. See Wiley v. Offshore Painting Contractors, Inc., 711 F.2d 601, 610-11 (5th Cir. 1983); Boeing v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969). Since TOTCO introduced evidence indicating that its recorder was not reasonably dangerous and that any injuries which Phillps incurred resulted from his negligence, we uphold the jury's findings.

C.

Phillps also contends that his negligence should not have been presented to the jury since his cause of action was premised on a strict liability theory.

This contention is untenable in the light of Bell v. Jet Wheel Blast, 462 So.2d 166, 171 (La. 1985). Bell clearly provides that such evidence can be admitted "[w]here the threat of a reduction in recovery will provide consumers with an incentive to use a product carefully, without exacting an inordinate sacrifice of other interests, comparative principles should be applied for the sake of accident prevention." Id. at 171. There are no grounds presented here that justify our questioning the district court's admission of this evidence of comparative negligence.

D.

Finally, Phillips contends that the trial court erred in disallowing certain evidence on the grounds of relevancy. Phillps sought to introduce evidence of unrelated equipment in an apparent attempt to attack the design of the TOTCO recorder. We hold that the district court's rejection of this unrelated evidence was well within the district court's discretion. See Nicholas v. Homelite Corp., 780 F.2d 1150, 1155 (5th Cir. 1986)

Having determined that Phillips' contentions have no merit, the jury's verdict and the judgment of the district court is

A F F I R M E D